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No. 523

In the Supreme Court of the United States

OCTOBER TERM, 1958

GEORGE BECKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 11) has not yet been reported. The opinion of the District Court (R. 189–196) is not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 22, 1958. The petition for a writ of certiorari was filed on November 18, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED*

1. Whether, as a condition precedent to a conviction

*As appears *infra*, p. 6, these questions were not assigned as error in the courts below and this Court may, therefore, treat them as not properly open to review here.

for wilful neglect to comply with a Treasury summons in violation of Section 7210 of the Internal Revenue Code of 1954, petitioner must first be ordered by a District Court to comply with the summons.

2. Whether petitioner's knowing and wilful neglect to produce books and records ordered to be produced under a Treasury summons was of such a "passive" nature under the standards laid down in *Lambert* v. *California*, 355 U. S. 225, as to invalidate his conviction.

STATUTES INVOLVED

Internal Revenue Code of 1954:

> SEC. 7210 [as amended by Sec. 4 (h) of the Act of April 2, 1956, c. 160, 70 Stat. 87, and Sec. 208 (d) (3) of the Highway Revenue Act of 1956, c. 462, 70 Stat. 374, 387]. FAILURE TO OBEY SUMMONS.
>
> Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda, or other papers, as required under sections 6420 (e) (2), 6421 (f) (2), 7602, 7603, and 7604 (b), neglects to appear or to produce such books, accounts, records, memoranda, or other papers, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution.
>
> (26 U. S. C. 1952 ed., Supp. V, Sec. 7210.)
>
> SEC. 7604 [as amended by Sec. 4 (i) of the Act of April 2, 1956, *supra*, and Sec. 208 (d) (4) of the Highway Revenue Act of 1956, *supra*]. ENFORCEMENT OF SUMMONS.

* * * * *

(b) ENFORCEMENT.—Whenever any person summoned under section 6420 (e) (2), 6421 (f) (2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

* * * * *

(26 U. S. C. 1952 ed., Supp. V, Sec. 7604.)

STATEMENT

On April 17, 1958, in the Southern District of New York, a judgment of conviction was entered against petitioner for wilful and knowing neglect to produce books, accounts, records, memoranda, and other papers pursuant to a summons issued by the Internal Revenue Service. Petitioner, having waived trial by jury, was tried by the District Court, sentenced to thirty days' imprisonment, and fined $1,000. He is presently free on $1,000 bail. (R. 197–198.)

Petitioner is president of the Becker and Davis Fur Corporation, New York City. In September, 1955, the Internal Revenue Service examined the books and records of petitioner's corporation. In March, 1956, while petitioner's records were being checked concerning the sale of a fur coat to another taxpayer whom the Internal Revenue Service was examining, petitioner admitted to a Treasury special agent that he was evading excise taxes to the extent of about $10,000 a year; and the agent told him that this admission might result in further investigation. (R. 16–18; 190–191.) Thereafter, in the first part of August, 1956, a Treasury special agent told petitioner that he was conducting an investigation of the corporation's excise tax liability and asked for the records of the corporation. On that occasion, petitioner told the agent that the records requested had been consumed by a fire which had occurred on January 28, 1956. The special agent, on August 16, 1956, served a summons on petitioner directing that he produce corporation records for 1952 to 1955 at the Treasury offices on August 27, 1956. (R. 189–193.) Petitioner reiterated that the requested books and records had been destroyed by the January 28, 1956, fire, and petitioner's bookkeeper, who was present, said that the records were no longer available. (R. 106–107; 113.) Petitioner testified that, when the summons was handed to him, he looked at it but did not thoroughly read it. (R. 83.) The special agent told petitioner that, unless he complied with the summons, he could be prosecuted criminally and for contempt. (R. 30–31.) Petitioner appeared on August 27, 1956, and, after having been warned that a false

statement might be a criminal matter, again stated under oath that the books and records which had been requested in the summons had been destroyed by the fire on January 28, 1956. (R. 195; Ex. 8.)[1]

About a year after the Treasury summons was served, petitioner was served with a grand jury subpoena calling for the production of the same records. (R. 191, 194.) Petitioner's counsel and Government counsel agreed at the trial that these records were not produced in response to the grand jury subpoena until after Government counsel informed defense counsel that the Government knew the records had been seen after the fire. (R. 130, 157–158, 194.)

The District Court, trying the case without a jury, found that an examination of the debris by the fire department officials did not indicate that any such records as were involved herein had been destroyed in the fire; that petitioner did not at the time read the summons with care, and did not thereafter ask the bookkeeper for any of the specific records referred to in the summons; and that petitioner did not make a thorough examination to ascertain whether there were any such records available. "However, examination by the Court of these very books indicates that if anybody had made even a casual investigation he would have seen that they had in them records such as were called for by the summons." (R. 195.) The District Court found that petitioner had treated the summons

[1] Petitioner's sworn statement of August 27, 1956, was introduced as Exhibit 8 (R. 33–34) and is reproduced as Appendix A to petitioner's brief in the Court of Appeals, a copy of which has been lodged with the Clerk. See page 46 thereof.

in a casual manner, and that, if petitioner had made any sort of investigation at all, he would have found that a lot of the things called for by the summons were available. The District Court found beyond a reasonable doubt that petitioner had wilfully and knowingly neglected to produce certain of the books, etc., called for by the summons. (R. 192–196.)

ARGUMENT

As petitioner admits (Pet. 10), the questions which he presents on this petition were not assigned as error either in the District Court or in the Court of Appeals. We submit that this is not such an exceptional case as to warrant consideration by this Court where petitioner has failed to seek a review of the questions in the courts below. *Duignan* v. *United States*, 274 U. S. 195, 200; *Husty* v. *United States*, 282 U. S. 694, 701–702; compare *Brotherhood of Carpenters* v. *United States*, 330 U. S. 395, 412. In any event, the questions sought to be raised do not require further review.

1. Petitioner first contends (Pet. 6) that Section 7210 of the Internal Revenue Code of 1954, *supra*, p. 2, which provides that it shall be a misdemeanor to neglect to appear or to produce books, etc. in answer to a Treasury summons, requires that, before there may be a conviction for violation of the statute, there must first be an application to the District Court for enforcement of the summons. Nowhere in the statute is there such an express condition. Petitioner maintains (Pet. 7), however, that such a condition must be read into Section 7210 because of the reference therein to

Section 7604 (b) of the Internal Revenue Code of 1954, *supra*, pp. 2–3. Section 7210 refers to other sections of the Internal Revenue Code of 1954, *i. e.*, Sections 6420 (e) (2), 6421 (f) (2), 7602, 7603, 7604 (b), which also deal with the summons procedure for examination of books and witnesses. Section 7604 (b) provides the District Court (or United States Commissioner) with power to enforce obedience to the requirements of the summons and to punish for disobedience as a contempt of court. However, as petitioner points out (Pet. 6), these sections are all part of one statutory scheme. They provide the Treasury Department with full means: (1) to seek the help of the District Court to enforce obedience to the requirements of the Treasury summons under the provisions of Section 7604 (b), or (2) in the event of wilful and knowing neglect to appear or to produce books, etc., as required by the Treasury summons, to impose criminal sanctions under the provisions of Section 7210. If there were disobedience of an order of a District Court requiring compliance with a summons, a contemnor could be punished summarily;[2] if a defendant were tried for violation of Section 7210, he would be entitled to trial by jury. *Brody* v. *United States*, 243 F. 2d 378, 381, 384 (C. A. 1st), certiorari denied, 354 U. S. 923. It has long been held that conduct deemed to constitute contempt may also be punishable as a substantive crime. Cf. *Ex parte*

[2] Authority for the court to punish summarily for disobedience of its order under Section 7604 (b) is, of course, found only in 18 U. S. C., Section 401, not in Section 7210, as petitioner appears to suggest. (Pet. 9.) *Brody* v. *United States*, 243 F. 2d 378, 381 (C. A. 1st), certiorari denied, 354 U. S. 923.

Savin, 131 U. S. 267, 275; *Ex parte Hudgings*, 249 U. S. 378, 382; *Green* v. *United States*, 356 U. S. 165, 173.

The Treasury Department when conducting an examination of a taxpayer's tax affairs is primarily interested in having the taxpayer appear and give testimony or produce his books, not in jailing the taxpayer. The provisions of Section 7604 (b) provide the only means of securing the District Court's help in enforcing compliance with the summons. However, in the instant case, in August, 1956, no purpose would appear to have been served by requesting assistance of the District Court to order compliance with the summons since petitioner had previously represented that the books had been destroyed by fire. Thereafter, the Government learned that the books had been seen subsequent to the fire, and a grand jury subpoena was issued for their production. When petitioner was informed that the Government knew of the existence of the books, he produced them for the grand jury. The status of the matter, then, was that the books had been produced and there was no need to resort to the District Court for help under Section 7604 (b) for an order to produce the books.

In the meantime, a year had elapsed and the Internal Revenue Service had been thwarted in its investigation during that period because of the representation by petitioner that his books had been destroyed by fire. "In many ways, taxpayers' neglect or deceit may prejudice the orderly and punctual administration of the [taxing] system as well as the revenues

themselves." *Spies* v. *United States*, 317 U. S. 492, 495. Clearly, the instant case was one for recourse to the criminal provisions of Section 7210 rather than the enforcement powers of the District Court under Section 7604 (b).

A statutory predecessor to 1954 Code Section 7210 was, as petitioner indicates (Pet. 8), embodied in Section 15 of the Act of June 30, 1864, c. 173, 13 Stat. 223, 227. The language of that provision is substantially the same as is found today in 1954 Code Section 7210, except for the absence of any cross-reference to the judicial enforcement provisions contained in Section 14 of the 1864 Act (13 Stat. 223, 226). It seems abundantly clear that the provisions of the 1864 Act did not make the flouting of a court order a condition precedent to conviction for non-compliance with a summons to testify or produce books; nor have we found any indication of an opposite Congressional intent in subsequent legislation. Contrary to petitioner's statement (Pet. 8), the legislative history of Section 7210 is in fact enlightening in this respect, for the House and Senate Reports on the Internal Revenue Code of 1954 state that Section 7210 "contains no material change from existing law." H. Rep. No. 1337, 83d Cong., 2d Sess., p. A426 (3 U. S. C. Cong. & Adm. News (1954) 4017, 4574); S. Rep. No. 1622, 83d Cong., 2d Sess., p. 604 (3 U. S. C. Cong. & Adm. News (1954) 4621, 5254). It can be fairly assumed, then, that Congress intended no material change from the predecessor statutes when Section 7210 made reference to Section 7604 (b), and the former statutory provisions contained no requirement that there be a

court order before a person could be held to have violated such provisions.[3]

Petitioner contends (Pet. 9) that this Court should nevertheless interpret Section 7210 as requiring an order by the District Court before petitioner can be held to have violated that section, so that petitioner could test out the summons without incurring the risk of criminal liability. Aside from the fact that the legislative history of Section 7210 shows that no such procedure is required, it is clear that petitioner was not here seeking a day in court to test the validity of the summons or to assert a right not to produce. Instead, he sought to convince the agents that the books had been destroyed. We submit that petitioner, having failed to lay a foundation for it, should not be heard in this Court to assert an alleged right to a pretesting of the summons. Moreover, the requirement of obedience to a summons without a prior judicial test of the merits of the summons is not novel. Cf. *Watkins* v. *United States,* 354 U. S. 178, 208; *Sinclair* v. *United States,* 279 U. S. 263, 299. See

[3] The immediate antecedent of 1954 Code Section 7210 was Section 3616 (b) of the Internal Revenue Code of 1939 (26 U. S. C. 1952 ed., Sec. 3616 (b)). That section provided similar penalties for any person who neglected to appear or produce books upon being "duly *summoned* to appear to testify, or to appear and produce books as required under section 3615 * * *" (italics supplied). The summons requirements are set forth in Section 3615 (a), and not in Section 3615 (e), which contains the judicial enforcement provisions and which is the immediate antecedent of 1954 Code Section 7604 (b). The general reference to Section 3615 contained in 1939 Code Section 3616 (b), however, probably accounts for the carry-over into 1954 Code Section 7210 of the reference to the other statutory provisions, including 1954 Code Section 7604 (b).

also *Carlson* v. *United States*, 209 F. 2d 209, 212 (C. A. 1st).

2. Petitioner next contends (Pet. 9–10) that the District Court found that petitioner thought that the records had been destroyed by fire; that, while this was a mistaken belief, it nevertheless lulled petitioner into a passive state of doing nothing further to locate them when he was served with the summons; and that this case therefore comes within the doctrine of *Lambert* v. *California*, 355 U. S. 225. Contrary to petitioner's premise (Pet. 10) that the District Court found that petitioner thought the records had been destroyed by fire, the trial judge found that petitioner "apparently relied on the fact that there had been a fire to dismiss the whole idea that these books and records were available", and that "he obviously was making the wish father to the thought, * * *". (R. 195.) Unlike the situation in *Lambert* v. *California*, *supra*, where that defendant first knew of her duty to register when she was brought up on criminal charges, this petitioner had been served with a Treasury summons and thus knew, before his violation of the statute occurred, of his duty to produce the books, etc. In addition, petitioner was informed on that occasion that failure to produce the records might subject him to a contempt finding and a criminal charge; and, when he appeared and testified under oath that the records were destroyed by fire, he was warned that a false statement might subject him to a criminal charge. As petitioner apparently concedes (Pet. 9), the District Court found that petitioner wilfully and knowingly neglected to produce the records. Wilfulness

was thus an essential element of the offense, the absence of which element from the offense charged in *Lambert* v. *California, supra,* pp. 227–228, this Court held to be crucial in assessing the conduct there involved as wholly passive. See *Screws* v. *United States,* 325 U. S. 91, 101.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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